IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 812

AMERICAN STORES, INC., PETITIONER,

vs.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Counsel for Petitioner.

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The American Stores, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia in the above case, entered on December 13, 1943, reversing the decision of the Municipal Court of Appeals for the District of Columbia, which had affirmed the decision of the Municipal Court for the District of Columbia, Small Claims Branch.

OPINION BELOW.

The opinion of the Municipal Court of Appeals for the District of Columbia (R. 7-13) is reported in 32 A. (2d) 388. The opinion of the Circuit Court of Appeals for the District of Columbia (R. 17-20) is reported in 139 F. (2d) 377.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia was entered December 13, 1943 (R. 21). A petition for rehearing (R. 22-31) was denied January 3, 1944 (R. 31). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, and the Act of January 31, 1928, 45 Stat. 54.

STATUTE AND REGULATION INVOLVED.

The Statute involved is Section 205(e) of the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. #901, et seq.), which reads as follows:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action

under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

The maximum price regulation involved is the General Maximum Price Regulation (7 Fed. Reg. 3153) issued pursuant to Section 2 of the Act on April 28, 1942, effective May 18, 1942, as to establishments selling at retail.

QUESTIONS PRESENTED.

(1) Whether Section 205(e) of the Act applies to an overcharge of 4 cents over the maximum price established by a regulation issued pursuant to Section 2 of the Act, where it is undisputed that the overcharge was an innocent mistake and that no opportunity to rectify the error was ever afforded to the seller; and (2) whether, if the section does apply, the Court may award judgment for less than $50.

STATEMENT.

Josephine McCorry filed suit against the petitioner for $50 damages in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia (R. 2). She complained that she had purchased a can of Campbell's soup at a store of the petitioner for 14¢, which was 4¢ more than the maximum price for such soup established by the General Maximum Price Regulation. Prior to trial, Prentiss M. Brown, then Administrator of the Office of Price Administration, applied for and was granted leave to intervene[1] (R. 1).

[1] The application was made and granted pursuant to Section 205(d) of the Act.

The evidence showed she had paid 14¢ for a can of "Old Style" Campbell's soup, the ceiling price on which was 10¢. About four weeks before the sale, "New Recipe" Campbell's soups, bearing a ceiling price of 14¢,[2] were placed on the market. The petitioner kept the old and new products on the same shelves, with the respective price ceilings properly posted, and the shelves properly marked. For the convenience of its cashier, the petitioner followed the practice of marking each article in the store with the price of such article. The can purchased by Miss McCorry was incorrectly marked 14 instead of 10¢ (R. 8-9). The improper marking of the can was the mistake of an employee. There was no evidence of any intent to violate the price ceiling. It did not appear that Miss McCorry called the petitioner's attention to the error before commencing this action (R. 9).

The Municipal Court rendered judgment for $5.00 and costs (R. 2). The Price Administrator appealed to the Municipal Court of Appeals for the District of Columbia, where the judgment was affirmed on June 8, 1943, Judge Hood dissenting (R. 7, 14). Thereupon, the Price Administrator appealed to the Court of Appeals for the District of Columbia, which reversed on the theory that under Section 205(e) the Court has no discretion whatever, regardless of the circumstances, to render judgment for less than $50, once the fact of an overcharge is shown (R. 17-21). On December 14, 1943, by order of the Court of Appeals, Chester Bowles, Administrator, Office of Price Administration, was substituted as intervenor-appellant in place of Prentiss M. Brown (R. 15-16).

A petition for rehearing was filed by the petitioner on December 28, 1943, and denied January 3, 1944 (R. 22, 31).

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[2] By virtue of Maximum Price Regulation 181, issued July 17, 1942, effective July 18, 1942 (7 Fed. Reg. 5560), as amended.

On January 10, 1944, the Court of Appeals stayed its mandate to and including February 5, 1944, pending application to this Court for a writ of certiorari. Subsequently, by orders dated January 29, 1944 and March 4, 1944, the mandate was further stayed to and including April 6, 1944.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the District of Columbia erred:

(1) In holding that Section 205(e) of the Act is applicable to overcharges made wholly by mistake, in good faith and without intent to violate the regulation.

(2) In holding that Section 205(e) of the Act, if applicable to such overcharges, requires the imposition of the maximum allowable penalty in every case regardless of the circumstances.

(3) In holding that Section 205(e) of the Act provides for liquidated damages rather than a penalty, and, as so construed, is constitutional, notwithstanding it requires a judgment for $50 when the actual damages sustained are only 4¢.

(4) In reversing the judgment of the Municipal Court of Appeals.

REASONS FOR GRANTING THE WRIT.

Section 205(e) of the Emergency Price Control Act directly and vitally affects every one of the millions of retailers and consumers in the land. As construed by the court below, it is capable of causing ruin to many persons without furthering the purposes for which it was intended. This case therefore presents a question of general importance in the interpretation and administration of a major war statute which has not yet been, but should be, decided by this Court. Since the decision of the court below is

the first in a United States Court of Appeals involving the construction of Section 205(e), there is no conflict among such courts on the question.

I.

SECTION 205(e) IS NOT APPLICABLE TO AN INNOCENT OVERCHARGE.[3]

a. Section 205(e) is penal in operation.

Section 205(e) provides:

> "If any person selling a commodity violates a regulation * * * prescribing a maximum price * * * the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorneys fees and costs as determined by the Court. * * *"

Insofar as the section provides for an exaction which goes beyond mere redress for injury suffered, it is penal in operation. The judgment of the court below would require the petitioner to pay $50 for an innocent over-

[3] The Court of Appeals said that "neither appellee [petitioner] nor the Municipal Court of Appeals suggests that inadvertence is a defense or that appellee has any defense. On the contrary, the Court says and appellee does not deny that the judgment against appellee was proper." (R. 18). As a matter of fact, however, this defense was made in the Municipal Court and ignored (R. 5). And it was also raised in the Court of Appeals in the petition for rehearing (R. 29-30). It is true that petitioner did not take a cross-appeal, but this is immaterial. It is well settled that without a cross-appeal any matter appearing in the record may be relied upon, although the argument may involve an attack upon the reasoning of the lower court or an insistence on matter overlooked or ignored by it. What an appellee who has failed to take a cross-appeal may not do is attack the judgment with a view to enlarging his own rights thereunder or lessening the rights of his adversary. *Morley Co. v. Maryland Casualty Co.*, 300 U. S. 185; *Helvering v. Pfeiffer*, 302 U. S. 247; *LeTulle v. Scofield*, 308 U. S. 415. The petitioner is safely within this rule. While the judgment for $5.00 of the Municipal Court may not be disturbed, this Court can properly consider any matter which affects the validity of the decision of the Court of Appeals. The issue here is not whether the judgment of the Municipal Court is correct but whether the decision of the Court of Appeals is erroneous.

charge of 4¢, or 1,250 times the amount of the actual damages. This clearly is a penalty. *United States v. Chouteau*, 102 U. S. 603, 611; *Huntington v. Attrill*, 146 U. S. 657; *O'Sullivan v. Felix*, 233 U. S. 318, 324; *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572; *Sutherland, Statutory Construction* (3rd Ed.) Vol. 3, Sec. 5602, p. 46.

b. Rule with Respect to Intent in a Penal Statute.

It was the established rule that scienter is always an essential element of a statutory penal law, although not in terms required. *Baender v. Barnett*, 255 U. S. 224. The rule has been modified only to the extent that the purposes of the statute would otherwise be obstructed. *United States v. Balint*, 258 U. S. 250, 251-2. To interpret a penal law to inflict substantial punishment for accidental or nonculpable conduct would seem to require the discernment of a legislative purpose to induce in this drastic manner the highest possible standards of care. Thus, in respect of penal statutes dealing with narcotics and foods and drugs, the courts have often dispensed with the requirement of scienter upon considering (1) the grave injury likely to follow from wilful and innocent violations alike, (2) the helplessness of the public to protect itself against such injury, and (3) the impossibility of enforcing the statutory prohibition if proof of scienter is required. *United States v. Balint*, 258 U. S. 250; *United States v. Dotterweich*, 320 U. S. 277; *United States v. Greenbaum*, 138 F. (2d) 437 (C. C. A. 3rd 1943). No such considerations are applicable here. Inflation control does not resemble food and drug regulation in the matter of the necessity for inducing by such harsh methods an insurer's standard of care. As will hereafter be shown, conscientious merchants who now and then make a mistake do not impair effective price control, and the public is in an excellent

position to protect itself against innocent overcharges and to obtain proof of wilful ones. Neither in the purposes nor the legislative history of the Act is there evidence of a Congressional intention that Section 205(e) should apply to overcharges made wholly by mistake.

c. The Legislative History of the Act.

Neither branch of Congress, in committee or elsewhere, appears to have addressed itself precisely to the question whether scienter is a prerequisite to the application of the sanctions of Section 205(e). It is clear, however, that the Section was aimed at persons who "defy regulation",[4] or engage in "profiteering"[5] as opposed to the law abiding merchant who must inevitably make an occasional mistake. Its avowed objective to "discourage" or to "deter" violations[6] can have reference to culpable conduct only, for other conduct is incapable of deterrence or discouragement.

Congress did not fear as a source of inflationary pressure the occasional mistakes of merchants who cooperate in price control. On the contrary, such merchants were regarded as the backbone of the campaign against inflation. Mr. Leon Henderson, testifying before the House Committee on Banking and Currency, was certain there could be no inflation if 90% of the buyers and sellers were cooperative,[7] and he thought the danger of inflation came from those "who take advantage of the tight markets" and buy for resale, "the brokers, chiselers, black markets, the curb markets, and the like".[8]

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[4] Senate Report No. 931, H. R. 5990, 77th Congress, 2nd Session, p. 8.

[5] Hearings Before The Senate Committee on Banking and Currency, 77th Congress, 1st Session on H. R. 5990, pp. 189, 192.

[6] Senate Report No. 931, H. R. 5990, 77th Congress, 2nd Session, p. 8; Hearings Before The Senate Committee on Banking and Currency, 77th Congress, 1st Session on H. R. 5990, pp. 189, 216.

[7] Hearings Before The Committee on Banking and Currency, House of Representatives, 77th Congress, 1st Session on H. R. 5990, p. 765.

[8] Ibid, p. 835.

d. The Purposes of the Act.

The primary purpose of the Act is the prevention of runaway inflation (Section 1(a)). The extreme importance of that purpose and the power of Congress to enact measures reasonably deemed necessary for its accomplishment are fully appreciated by the petitioner. Section 205(e) is such a measure, designed for the dual function, in furtherance of the primary Congressional purpose, of (1) inducing consumer cooperation in the enforcement of price ceilings and (2) providing additional deterrents against violations.[9] The query is whether these purposes and objectives would be obstructed if Section 205(e) were applicable only to culpable overcharges.

e. The Purposes Would not be Obstructed by the Requirement of Scienter.

In this case, the evidence showed that the applicable price ceilings had been properly posted in the petitioner's store and the shelves correctly marked, but by the mistake of an employee the wrong price had been inscribed upon the can sold to plaintiff. If the plaintiff had at any time called the petitioner's attention to the overcharge, the amount thereof would have been promptly refunded, or the overcharge would not have been made. This would be true in any case where the overcharge was innocent, thus disposing of the matter without trouble or injury to the consumer, the retailer, or the public, and certainly without any danger of inflation. However, if Section 205(e) is construed to apply to innocent overcharges, a premium virtually is placed upon the customer's silence. He will not speak for then he may lose the benefit of the penalty. As in this case, the storekeeper, no matter how strenuous

[9] Hearings Before The Committee on Banking and Currency, U. S. Senate, 77th Cong. 1st Sess. on H. R. 5990, p. 189.

his efforts to observe the law, will be given no opportunity to correct his error, but must appear in court and bear not only the penalty but the stigma of being adjudged a violator. Subsequent, perhaps less discerning, customers probably will be overcharged too in consequence of the same mistake, and those who notice it will have no more incentive than the first to inform the storekeeper. It is obvious that a single mistake of the kind made in this case can involve penalties running into thousands of dollars. The petitioner is at a loss to see how all this would contribute to effective price control.

The practical effect of construing Section 205(e) as requiring scienter would be to allow recovery in most cases only where the overcharge was called to the seller's attention, and was nevertheless persisted in.[10]

Far from impairing the efficacy of the Section as an instrumentality for securing consumer cooperation, this interpretation would induce cooperation of a more constructive and communaly useful character. The buyer who notices an innocent overcharge,[11] but says nothing and subsequently brings suit, helps substantially no one but himself. On the other hand, the buyer who calls it to the seller's attention cooperates in a real sense, for he helps the seller cooperate, he saves fellow consumers the burden of an overcharge they might not notice, and he aids in the administration of the Act by bringing wilful violators to light. There is no reason for believing that consumers generally will be less zealous to protect their rights because penalties may be recovered only for inten-

[10] Such a showing would, of course, be unnecessary if an intentional overcharge could be otherwise shown, as where a second customer is overcharged after a first has given notice.

[11] Under the regulations of the OPA storekeepers are required to post ceiling prices or to mark their shelves. General Maximum Price Regulation, 7 Fed. Reg. 3153. In this case both methods were used.

tional overcharges, where the seller's intention is so easily ascertained and where at the very least, the calling of the seller's notice to the overcharge will result in reparation to the consumer. One small but active group may be discouraged, who would and do make a racket out of consumer cooperation in price control by shopping not for merchandise, but for overcharges. While these persons do not come within the letter or the spirit of the Section, it is not possible as a practical matter to differentiate them from those who do.

Quite appropriately the Court of Appeals set out to interpret Section 205(e) "to enlist the help of consumers in discouraging violations". But it is one thing to enlist legitimate consumer cooperation, and quite another to create a lucrative racket for the unscrupulous at the expense of honest retailers who make a sincere effort to comply with price regulations. The simple act of notifying the proprietor of an overcharge would distinguish the legitimate consumer from the extortioner, and the wilful from the innocent violator.

It is even probable that with respect to innocent overcharges the recovery of comparatively large penalties in the long run would have an inflationary rather than deflationary effect.

f. The Requirement of Scienter in the Application of Section 205(e) Would Avoid Great Hardship.

The burden which the application of Section 205(e) to innocent overcharges places upon small and large retailers alike is too oppressive to be ignored in the course of interpretation. Even a small grocery handles thousands of items daily, and large stores, such as the petitioner, handle many thousands. Labor scarcity caused by the war re-

quires the employment of inexperienced, often incompetent help, and in combination with human fallibility dooms any hope of achieving perfection in the observance of price ceilings.

In *The Hecht Co. v. Bowles*, 320 U. S. . . , 12 L. W., 4188, (Decided February 28, 1944), a spot check of 6 out of 107 departments in The Hecht Co. store disclosed some 3,700 sales in excess of maximum prices during a period of about 6 months. There was no doubt of The Hecht Co.'s good faith and diligence. The Court said:

> "Misunderstanding of the regulation, confusion on the part of employees not trained in such problems of interpretation and administration, the complexity of the problem, and the fallibility of humans all combined to produce numerous errors."

This condition is true not only of The Hecht Co., but of the great majority of retailers. Under the decision of the court below, The Hecht Co. was liable to be assessed for penalties in the minimum sum of $185,000 for overcharges disclosed by the spot check of only a few of its departments. If the experience in these departments was typical, its total liability was in a staggering sum. With respect to the petitioner, an unavoidable mistake in pricing a small item of which thousands are sold in a day may result in similar losses. The harshness of the construction which requires such results is matched only by the lack of necessity for it. Inflation is not curbed by assessing thousands of dollars in penalties for overcharges totalling a small amount against those who are already doing all they can to comply with the regulations. It is the wilful violator who presents the threat to effective price control.

g. Similar Statutes Dealing With Railroads Are Invariably Construed to Apply Only to Intentional Overcharges.

Almost all of the states have had legislation fixing the maximum rates to be charged by railroads and imposing penalties for overcharges. Where the statutes did not specify scienter in defining the offence and the penalties provided were pecuniary exactions to be recovered by the persons aggrieved, they were closely analogous in form and purpose to Section 205(e). In applying such statutes, the state courts never extended their operation to unintentional overcharges. *Little Rock & Ft. S. Ry. Co. v. Clark*, 58 Ark. 490, 25 S. W. 504 (1894); *Brown v. Seaboard Air Line Ry. Co.*, 122 S. C. 333, 115 S. E. 638 (1923); *Atlantic Coast Line R. R. v. Connell*, 111 Fla. 572, 149 So. 596 (1933); *Hall v. Norfolk & W. R. Co.*, 44 W. Va. 36, 28 S. E. 754 (1897); *American Express Co. v. Crawley*, 88 Miss. 525, 41 So. 261 (1906).

Very much the same considerations were involved in the construction of the maximum rate laws as are now involved in the construction of Section 205(e). They also were designed to enlist consumer cooperation in the enforcement of maximum prices, where bargaining power is unequal[12] and the machinery of government enforcement inadequate. The state courts evolved practicable rules in the application of the penalties which were fair to the railroads, but not obstructive of the purposes of the law. Penalties were allowed where the overcharge was result of culpable conduct. *St. Louis, I. M. & S. Ry. Co. v. Waldrop*, 93 Ark. 42, 123 S. W. 778 (1909); *St. Louis Southwestern Ry. Co. v. Alverson*, 168 Ark. 662; 271 S. W. 27 (1925). An excessive charge was prima facie evidence of culpability

[12] The inequality of bargaining power in respect of railroad rates arose out of monopoly or near monopoly conditions, whereas in time of war, in respect of prices generally, it is the result of a scarcity of consumer goods.

which could be rebutted by proof to the contrary. *Little Rock and Ft. S. Ry. Co. v. Clark,* 58 Ark. 490, 25 S. W. 504 (1894); *Brown v. Seaboard Air Line Ry. Co.,* 122 S. C. 333, 115 S. E. 638 (1923). And where the overcharge was intentional, it was of no significance that the passenger failed to call attention to it. *Little Rock & Ft. S. Ry. Co. v. Clark,* 58 Ark. 490, 25 S. W. 504 (1894). These laws for the most part have been outmoded and repealed, but the decisions are still a trustworthy guide to an effective and equitable construction of Section 205(e).

It may be objected that the requirement of scienter would make the issues in a proceeding under Section 205(e) so complex as to discourage consumer actions. There is little substance in that, for where the retailer persists in an overcharge after it is called to his attention, wilfulness is clearly shown. In any event, once the overcharge has been proved, the burden is on the defendant to show his innocence. *Brown v. Seaboard Air Line Ry. Co.,* 122 S. C. 333, 115 S. E. 638 (1923).

II.

IF SECTION 205(e) IS APPLICABLE TO INNOCENT OVERCHARGES, IT FIXES ONLY THE MAXIMUM AMOUNT OF THE PENALTY.

a. Subject to the Maximum Amount, the Language of The Statute Leaves the Amount of the Penalty in the Discretion of the Court.

Section 205(e) gives an aggrieved buyer the right to "bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs * * *". The amount of the buyer's recovery is not fixed, but only the maximum amount he can sue for. The Court of Appeals held that unless the Section means

that the buyer must recover the greater of $50, or treble the amount of the overcharge, the language is without significance. The Court thought the only alternative construction would allow the buyer to commence his suit, but not prosecute to judgment, and this it could not accept. Neither the construction adopted nor the one rejected by the Court of Appeals was requested by the petitioner. The first is not warranted by the language of the Section, and the second is the sort of blind literalism which would serve to eviscerate any statute.

In the petitioner's view, the Section is not ambiguous. It confers upon the buyer a right to bring an action for $50, which to be of any substance must include the right to prosecute to judgment, and the right to recover $50, if the court should conclude that judgment for that sum is justified. But the right to "bring an action" for $50 traditionally has never included the invariable right to recover judgment for that full amount, nor is such result required in order to give substance to the law. The Court of Appeals said that one would have a right to bring and prosecute an action for $50 without any statute and the Section must, if possible, be construed to grant something. But this overlooks that in the absence of statutory authorization, courts have no power to award judgment for $50 or treble the amount of the overcharge unless actual damage in such amount is shown. Section 205(e) gives them the necessary authority but does not deprive them of their customary discretion in matters of that kind. The argument that the Section enacts nothing unless construed as a mandate requiring the assessment of the full penalty in every case, is unfounded and must fail.

The interposition of judicial discretion between the citizen and the state in the application of penal laws is so obviously civilized and enlightened that its discard should

not be assumed without a clear legislative direction. There is no historical basis for assuming a Congressional mistrust of judicial discretion in cases of this kind. In its approach to and consideration of the present case, the Court of Appeals was clearly influenced by the position it had taken in *Brown v. Hecht Co.*, 137 Fed. (2nd) 689 (App. D. C., 1943) subsequently reversed, *The Hecht Co. v. Bowles*, 320 U. S. ....., 12 L. W. 4188 (decided February 28, 1944). The Court quoted from its earlier decision the premise that "Innocent non-conformity with the Price Control Act is as inflationary and as damaging to competitors and the public as guilty non-conformity" (R. 18). This is an expression of opinion which there is no evidence that Congress shared and which has no basis in fact.[13] As a fundamental premise of the decision, it was bound to lead to an erroneous conclusion.

Section 205(e) carefully avoids the language ordinarily employed to deprive the Courts of discretion with respect to the amount of penalties.[14] While the petitioner agrees with the Court of Appeals that "Congress is under no obligation to use old language to express an old idea" (R. 19), it is still true that new language is a more probable indication that a different idea was intended.

If Section 205(e) is construed to be applicable to innocent overcharges, the justice and common sense of leaving the amount of the penalty to judicial discretion become abundantly apparent. The conclusion reached by the Court of Appeals extends the penal language of the Section beyond its natural signification, and converts the courts into automatons mechanically imposing penalties without regard to hardship inflicted or whether they are subserving the ends of the law.

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[13] See p. 8 of this brief.

[14] 15 U. S. C., Secs. 15, 72, 835(d); 31 U. S. C., Sec. 231; 35 U. S. C., Sec. 74; 45 U. S. C., Sec. 83.

b. As a Penal Provision Section 205(e) Should be Strictly Construed.

Granted, *arguendo*, that there is ambiguity in the meaning of Section 205(e), the rule of strict construction would require the adoption of the construction contended for by the petitioner. While the rule is never applied to narrow the sense of statutory language in its ordinary acceptation or to defeat the legislative purpose, as between reasonable competing constructions, either of which would carry out that purpose, it requires that the less harsh be adopted. *Securities and Exchange Comm. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344. If no clear contrary legislative intent can be determined, the restrictive interpretation is proper. *Bolles v. Outing Company*, 175 U. S. 262; *United States v. Koenig Coal Co.*, 270 U. S. 512.

The Administrator of the OPA contends that Section 205(e) must be construed as prescribing an exaction in the minimum sum of $50, regardless of mitigating circumstances, whenever there has been an overcharge. In this view, the full penalty must be imposed whether or not it would serve the policy of the Act, or any useful social purpose, and no matter how injurious to the defendant. The petitioner, on the other hand, contends that the Section reposes discretion in the courts as to the precise amount of the penalty, that it may be adjusted to the necessities of the individual case, but with a maximum in any event of $50, or treble the amount of the overcharge, whichever might be greater. The petitioner's view, concurred in by the Municipal Court of Appeals both in this case and in *Hall v. Chaltis*, 71 W. L. R. 349, 31 A. (2nd) 699 (1943), is clearly a fair and reasonable construction of the Act, and the petitioner is entitled to its benefits unless it conflicts with manifest legislative intention or tends to defeat the legislative purposes.

c. There is Support in the Legislative History of the Section for Petitioner's Construction.

In *The Hecht Co. v. Bowles*, 320 U. S. , 12 L. W. 4188, the Court found support in the legislative history of Section 205(a) for both of the contrary interpretations advanced. Somewhat the same situation exists in this case with respect to Section 205(e). The history of this Section is sketchy compared with that of other portions of the Act. The petitioner has been unable to find in the pertinent Congressional debates or committee hearings and reports any extended analysis of the scope and meaning of the language used. So far as the debates are concerned, there seems to have been no discussion of the Section. The Act as originally introduced in the House contained a provision substantially similar to the present Section, but it was deleted in committee apparently without comment. Opposition to the Section seemed to have developed during the course of the House Committee hearings[15] and some of the discussion has significance in the present inquiry.

When H. R. 5990 reached the Senate, Mr. David Ginsburg and Mr. Leon Henderson, on behalf of the Administration, actively and successfully urged the restoration of the Section. In this connection, Mr. Ginsburg submitted a brief to the Senate Committee on Banking and Currency, which appears at pages 189-192 of the printed record of the Committee hearings on H. R. 5990, and contains the most comprehensive statement with respect to the meaning and purposes of the Section which has been found. The brief, however, does not address itself to the question whether

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[15] Hearings Before The Committee on Banking and Currency, House of Representatives, 77th Congress, 1st Session, H. R. 5990, pp. 389, 764-5, 829.

the courts are to have any discretion in imposing the penalty.[16]

Subsequently, in a symposium, appearing in an issue of *Law and Contemporary Problems*,[17] upon various aspects of the Emergency Price Control Act, which has been regarded as one of the most authoritative expressions of views on the subject, Mr. Ginsburg said:

> "This provision [Section 205(e)] has caused some concern on the ground that it may be abused not only by irate and uninhibited consumers and consumer groups, but by others less well intentioned. It is distinctly unpleasant in wartime to be hauled into court and charged with profiteering; a seller might well prefer to forestall the threat with a cash payment. To this criticism there are two answers. The first is that in the more blatant cases of abuse, the Administrator could intervene on behalf of the defendant and probably would."

The intervention of the administrator would serve no useful purpose if the courts are without discretion in the premises. Nothing in the Act purports to grant such discretion only when the administrator intervenes, and, *a fortiori*, if it exists then it must exist in his absence, or even when he is on the other side. Mr. Ginsburg was largely instrumental in securing the enactment of Section 205(e) and at the above writing was general counsel to the Office of Price Administration.

In the Report of the Senate Committee on Banking and Currency on H. R. 5990, Section 205(e) is described three

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[16] At pp. 189-191 of the committee hearings, Mr. Ginsberg reviews the precedents in Federal legislation permitting private citizens to recover double or treble damages when injured by violations of law. These precedents are of two different kinds, those clearly making the penalties mandatory: 15 U. S. C., Secs. 15, 72; 45 U. S. C., Sec. 83; and those clearly leaving their amount to judicial discretion: 15 U. S. C., Secs. 96, 124; 35 U. S. C., Sec. 67. The language used in Section 205(e) differs from both.

[17] Law and Contemporary Problems, Vol. IX, No. 1, p. 56.

times, but it would be difficult to draw from these statements any support for the position urged by the Administrator.[18]

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[18] Senate Report 931, 77th Congress, 2nd Session. The three descriptions are as follows:

(1) "Price control which cannot be made effective is at least as bad as no price control at all. It will not stop inflation, and enables those who defy regulation to profit at the expense of the buyers and sellers who unselfishly cooperate in the interests of the emergency. To discourage initial violations, the committee substitute provides for actions at law to recover $50 or three times the amount of the illegal overcharges. This will permit private purchasers who buy for personal use or consumption, rather than in the course of trade or business, to protect themselves against violations of the act." (p. 8).

(2) "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the Government of a part of the burden of enforcement and to deter initial violations. They afford a remedy at law to persons damaged by having had to pay unlawfully high prices. An action of this sort may be brought by any person who buys for use or consumption other than in the course of trade or business, to recover from the seller who violates a price regulation, or price schedule, damages in the sum of $50 or treble the amount of the unlawful overcharge. Reasonable attorney's fees and costs are to be allowed by the court to a buyer who prevails in such a suit. The same remedy is made available to persons who pay excessive rentals for defense-area housing accommodations. A similar provision has already been incorporated in the District of Columbia rent law just passed by Congress. All such actions may be brought in any Federal court or State court of competent jurisdiction, and must be instituted within 1 year after delivery is completed or rent is paid. The further provision that the Administrator may sue on behalf of the United States not only where the United States is the consumer but also if the Buyer is not entitled to bring suit will apply to situations in which the buyer is barred for bad faith or for some other reason, or in which the buyer is a purchaser in the course of trade or business. This subsection does not become effective until 6 months after the enactment of this bill." (p. 9).

(3) "Section 205(e) gives any purchaser of a commodity for use or consumption other than in the course of trade or business a right to bring an action against the seller who violated a maximum price or rent regulation or order or price schedule for $50 or treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney fees and costs. For the purposes of all subsections of section 205 the buying or selling of a commodity is defined to include the payment or receipt of rent for defense-area housing accommodations. If a buyer, whose seller has violated a maximum-price regulation or price schedule, is not entitled to bring such action, because he is a buyer in the course of trade or business, or for other reasons the Administrator may bring such action against the seller on behalf of the United States. All suits for treble damages must be instituted within 1 year after the delivery is completed or the rent paid, and may be brought in any court of competent jurisdiction. The effectiveness of section 205(e) is postponed until the expiration of six months from the date of enactment of this bill." (p. 26).

After its passage by the Senate, the bill was sent to conference, where the managers on the part of House accepted the Senate amendment returning Section 205(e) to the Act.

The statement of the managers to the House with respect to the Section describes it as permitting "a civil action by non-commercial consumers for treble the amount of any unlawful overcharge (or a minimum of $50) made by any seller".[19]

This is all that is said. It is a terse paraphrase in which the words "a minimum of" are substituted for "whichever is the greater".[20] The Price Administrator and the Court of Appeals rely upon it as conclusive evidence of a legislative intention to divest the courts of any discretion as to the amount of the penalty, but it is flimsy evidence at best, for there is no reason to believe that the conference considered the question of judicial discretion or that the managers' choice of phraseology was other than accidental.

The language of Section 205(e) in its common acceptation would leave the amount of the penalty to the discretion of the courts while the history of the Act discloses nothing sufficient to require a different result. Nor would such judicial discretion be at variance with the Congressional purposes.

d. The Purposes of the Act Will be Better Served by the Petitioner's Construction of Section 205(e).

The Price Administrator has argued that there will be a breakdown in cooperative consumer enforcement, unless Section 205(e) is construed to divest the courts of all dis-

[19] House Report No. 1658, 77th Congress, 2nd Session (1942), p. 26.

[20] It would be quite natural in making a terse paraphrase of the Section to fall into the use of this substitution and when the wording of the original is kept in mind, it is clear that no suggestion of an absence of judicial discretion as to the amount of the penalty was intended.

cretion with respect to the amount of the penalties. No actual experience is cited for this view and it smacks more of advocacy than of fact. The assumption is that the courts will not exercise their discretion wisely, and will tolerate wartime profiteering and wilful overcharging, and that consumers will not cooperate in price control unless awarded the full penalty for wilful and innocent overcharges alike.

It is not realistic to assume that the courts would hesitate to penalize a wilful violator in the maximum legal amount, but where the overcharge is innocent and the buyer has failed to call it to the seller's attention, a refusal to award the maximum penalty is to be expected. Nor would this result in consumer apathy. Persons who will take the trouble to sue will hardly be loathe to point out an overcharge to the seller, and if they will sue for an innocent overcharge, they will surely sue for a wilful one. One of the boasts of the American people is their sense of fair play, and most consumers would probably give the seller a chance to rectify his mistake. But there are many who are more likely to be moved by venal considerations. To award such persons the full penalty although they have made no effort to ascertain whether the overcharge was wilful or innocent is hardly the way to obtain consumer co-operation.

The judgment of the Municipal Court compensated the plaintiff for her trouble and implicitly instructed her that thenceforth she would better serve the community by offering storekeepers an opportunity to correct their errors. This construction of the Section operates to induce open handed co-operation between buyer, seller and government. Compared with it, the result reached by the court below, which sets the consumer at war with all merchants and gives him the power to exact tribute for innocent mistakes,

is a poor contribution to price control. If the courts are without discretion as to the amount of the penalty, innocent and wilful overcharges must be penalized alike and great hardship frequently visited upon patriotic and sincerely law-abiding merchants. The Courts will be required to reward the outlaw consumer who shops the stores for innocent overcharges and silently steals away. Such consumers are not helpful in price control. They are merely an additional harassment to storekeepers in wartime. But they may be converted into effective agents of enforcement if their cupidity is directed at the wilful violator.

In this case the Municipal Court gave judgment for the plaintiff in the amount of $5.00. Had the overcharge been wilful the maximum of $50 would no doubt have been awarded. But it was innocent, and the plaintiff could have avoided her trouble and the inconvenience of a court appearance to the petitioner by calling its attention to the overcharge. If the judgment stands she will surely do that the next time she is overcharged. If it is increased to $50, she surely will not. Consumer cooperation in enforcement as intended by Congress must have meant more than simply enriching in the sum of $50 every consumer lucky enough to have been overcharged. The difficulties of the retailer in abiding by the complexities of price regulations are notorious. Real cooperation would require that the consumer lend him a helping hand. This places no additional burden on the consumer for he must be aware of the ceiling prices no matter which construction the Court adopts.

The absence of an ameliorative judicial discretion will result in the imposition of the full amount of the allowable penalty indiscriminately in every case. As applied to innocent overcharges, this construction enlists the consumer in a plan of entrapment and extortion rather than in the fight

against inflation. It entails the harshest possible interpretation of a penal measure and a distrust of a traditional function of the judiciary. Every rational consideration compels its rejection.

e. The Construction adopted by the Court Below Raises Doubts of the Constitutionality of Section 205(e) as Applied to the Facts of This Case.

This Court has sustained the constitutionality of legislation imposing civil penalties beyond the amount of the actual damages caused by infractions of law, to be recovered by the person injured. *Missouri Pacific R. Co. v. Humes,* 115 U. S. 512; *Minn. & St. Louis R. Co. v. Beckwith,* 129 U. S. 26.

When early confronted with a challenge on grounds of due process to the validity of such a law, the Court found no difficulty in disposing of the contention. *Missouri Pacific R. Co. v. Humes,* 115 U. S. 512. It was pointed out that statutes granting private persons the right to sue for penalties have their historical antecedent in the common law principle of awarding punitive damages in cases of aggravated misconduct. Statutory penalties are not invalid simply because the infractions which will incur them may be innocent. *Shevlin-Carpenter Co. v. Minnesota,* 218 U. S. 57. While the legislature has a wide discretion in fixing the amount of penalties, the amount prescribed must not be so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable, or it will amount to deprivation of due process. *St. Louis, I. M. & S. R. Co. v. Williams,* 251 U. S. 63; *Missouri Pacific R. Co. v. Tucker,* 230 U. S. 340; 138 A. L. R. 1218; 15 Am. Jur. 742. In determining the reasonableness of a penalty, the test is not alone its amount in relation to the actual damage inflicted, but public needs and the difficulties of law enforcement are

equally to be considered. *St. Louis, I. M. & S. R. Co. v. Williams,* 251 U. S. 63. The usual civil penalty takes the form of double or treble damages, but this case presents a variation, for it is contended by the Price Administrator that the minimum penalty is $50 even though the actual damages are only 4¢. The Court is called upon to exact from the petitioner a penalty 1250 times the amount of the actual damages sustained as a result of the innocent overcharge. If this does not meet with the condemnation of the due process clause, it is hard to conceive of a penalty that will.

In *St. Louis, I. M. & S. R. Co. v. Williams,* 251 U. S. 63, the recovery by an overcharged passenger of a penalty of $75 for an overcharge of 66¢, or approximately 114 times the amount of the overcharge, was sustained. The statute involved provided for penalties ranging in the discretion of the court from $50 to $300, *and by the decision of the highest court of the state was inapplicable to innocent overcharges though it made no mention of scienter. Little Rock & Ft. S. Ry. Co. v. Clark,* 55 Ark. 490, 25 S. W. 504 (1894). The evidence in the case showed that the overcharge was intentional.[21] The petitioner concedes that the case establishes the constitutional validity of a penalty of $50 in connection with a *wilful* overcharge of 4¢, but that is not the issue in the case at bar. What is presented for decision is whether a minimum penalty of $50 upon a showing of a mistaken overcharge, with no opportunity afforded the seller of making reparation, is not an unconscionable exaction, and so onerous a burden as to be without sufficient justification on grounds of public policy and a denial of due process.

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[21] This does not clearly appear from the reported decision. However, the record reveals that the plaintiff called the overcharge to the notice of the defendant's agent who nevertheless insisted on making it.

f. Section 205(e) Cannot be Sustained as a Compensatory Rather than a Penal Law.

Despite the fact that legislation such as Section 205(e) is universally regarded as penal, *Providence Steam-Engine Co. v. Hubbard,* 101 U. S. 188; *Huntington v. Attrill,* 146 U. S. 657; *O'Sullivan v. Felix,* 233 U. S. 318; 23 Am. Jur. 625, the Court of Appeals insisted on regarding it as remedial, that is to say, as tantamount to a provision for liquidated damages. If Section 205(e) is compensatory to the overcharged buyer rather than penal to the seller, then as applied to this case it is unconstitutional as depriving the petitioner of property without due process of law.

This follows from the principle clearly recognized in the recent case of *Overnight Motor Transportation Co. v. Missel,* 316 U. S. 572, involving the constitutionality of a liquidated damage provision in the Federal Fair Labor Standards Act of 1938, where the Court said (at pages 583-584):

> "The liquidated damages for failure to pay the minimum wages under Secs. 6(a) and 7(a) are compensation, not a penalty or punishment by the Government. * * * The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."

The foreseeable consequences of the retention of a workman's pay, upon the basis of which the ruling in the *Overnight* case was predicated, may be analogized to the retention by an insurance company of the proceeds of a life insurance policy, considered in the case of *Life and Casualty Insurance Co. of Tennessee v. McCray,* 291 U. S. 566, where the statute required the unsuccessful litigant to pay attorneys' fees as part of his adversary's costs, and in addition to the amount of the loss, 12% damages upon such amount.

There Mr. JUSTICE CARDOZO, in sustaining the State legislation, said (at pages 569-570):

> "Diversity of treatment in respect of the costs of litigation has its origin and warrant in diversity of social needs. * * * Dependents left without a breadwinner will be exposed to sore distress if life insurance payments are extracted slowly and painfully, after costly contests in the courts. Health and accident insurance will often be the sources from which the sick and the disabled are to meet their weekly bills. Fire insurance moneys, if withheld, may leave the businessman or the householder without an office or a home. Classification prompted by these needs is not tyrannical or arbitrary."

All these considerations apply with even greater force to a case of unlawful retention of a workman's pay.

But there are no similar unforeseeable consequences for which it is necessary or proper to provide *compensation* in the case of a sale made at a price in excess of the ceiling price prescribed pursuant to the Emergency Price Control Act of 1942.

The damages are neither too obscure nor difficult of proof for estimate other than by liquidated damages.

The measure of damages is the difference between the price paid and the price established by the Regulations, and if the plaintiff can recover costs and reasonable attorneys' fees as well, he is fully compensated for any possible foreseeable consequences of the overcharge. He is completely made whole, and when this is accomplished, the purpose of compensatory, as distinguished from punitive, damages, is fully achieved.

In the case of *Missouri Pacific R. Co. v. Tucker*, 230 U. S. 340, the Supreme Court considered an Act which provided that every common carrier

> "which shall demand, exact or receive for * * * transportation or delivery any sum in excess of the rates

> hereby made lawful shall be liable to any person injured thereby in the sum of $500 as liquidated damages, to be recovered by action in any court of competent jurisdiction, together with a reasonable atotrney's fee, to be fixed by the court."

The Court noted that the excess of the overcharge over the legal rate was $3.02, less than 1/150th of the authorized recovery. The court further did not overlook so-called "public policy", for it said:

> "On the other hand, the interests of shippers and consumers of oil must be considered no less than those of the carrier. Experience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that deviations from them be discouraged by adequate liabilities and penalties.
>
> "It is in the light of these considerations that the validity of the provision imposing a liability for liquidated damages in the sum of $500 for every charge in excess of the legislative rates must be tested." (p. 348).

In concluding that the statute was unconstitutional as applied to the facts in that case, the Court stated:

> "As applied to cases like the present the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law and therefore in contravention of the 14th Amendment." (p. 351).

In the case at bar, the actual damage—the amount of the overcharge—was only 4¢. This is 1/1250ths of the amount held recoverable by the Court of Appeals.

Such an award, in the light of the facts conceded in the instant case, is so extravagant in amount as to be beyond the bounds of reason and result in sheer oppression, and if, as the Court of Appeals held, the aim of Section 205(e)

is not to "penalize", constitutes a taking of property without due process of law and is therefore in contravention of the Fifth Amendment of the Constitution.

An illustration of the type of cases in which punitive damages or penalties are constitutionally permissible will be found in *Seaboard Airline Railway v. Seegers*, 207 U. S. 73, where the statute required common carriers to adjust and pay every claim for loss or damage to an intrastate shipment within forty days after the filing of the claim, under penalty of $50 for each failure or refusal, in the event of recovery of the full amount claimed.

There the Court said (at page 77):

> "The classification is based solely upon the nature of the business, that being of a public character. It is true that no penalty is cast upon the shipper, yet there is some guarantee against excessive claims in that, as held by the Supreme Court of the State in *Best v. Seaboard Airline Railway, supra,* there can be no award of a penalty *unless there be a recovery of the full amount claimed.*" (Italics ours).

There the Court was dealing, not with a provision for liquidated damages, but with a penalty, and the rationale of the opinion would seem to be that if a claim is presented to a carrier, which has much better means and facilities than the claimant of determining whether or not the claim is valid, and the carrier, with these superior facilities for information, rejects the claim, and thereafter the full amount of the claim is recovered, there is at least a strong inference that payment was wilfully and deliberately withheld. It is clear, therefore, that the basis for the validity of that statute was not to award damages to the plaintiff for all possible foreseeable consequences of the defendant's wrong, but to penalize the defendant for a wilful and deliberate act.

In view of these pronouncements of this Court, an award of 1250 times the amount of the actual damage, where there are no possible foreseeable consequences for which compensation can properly be awarded, surely must be held to be immoderate and without reasonable relation to the damage sustained.

CONCLUSION.

The Court of Appeals erred in dispensing with scienter as a prerequisite to the imposition of penalties under Section 205(e). In the alternative, the petitioner submits that the Court committed error in construing the section as a legislative mandate to award the maximum allowable penalty for every overcharge culpable or otherwise. This case therefor calls for the exercise by the Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Court of Appeals.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals of the District of Columbia be granted.

ALLAN SAUERWEIN,

HERBERT LEVY,

WALTER E. GALLAGHER,

DAVID P. GORDON,

Counsel for Petitioner.

March, 1944.

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CITATIONS

Cases:

582648—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 812

AMERICAN STORES, INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia. The opinion of the Municipal Court of Appeals for the District of Columbia is reported in 32 A. (2d) 388 (R. 7–13). The opinion of the United States Court of Appeals for the District of Columbia is reported in 139 F. (2d) 377 (R. 17–20).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered December 13, 1943 (R. 21). A petition for rehearing (R. 22–31) was denied January 3, 1944 (R. 31). The petition for a writ of certiorari was filed in this Court on March 23, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in a consumer's action for statutory damages for a price overcharge, pursuant to Section 205 (e) of the Emergency Price Control Act, the damages awarded must be in the amount of $50 or treble the amount of the overcharge, whichever is the greater, or whether, as petitioner contends, the statute reserves discretion to the trial court to award a lesser judgment.

STATUTE AND REGULATION INVOLVED

This case involves the Emergency Price Control Act of 1942 (Act of Jan. 30, 1942, 56 Stat. 23, 50 U. S. C. App., Supp. II, Sec. 901) and the General Maximum Price Regulation (7 F. R. 3153) issued thereunder.

Section 205 (e) of the Act, under which this suit was brought, provides as follows:

> If any person selling a commodity violates a regulation, order, or price schedule

prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

Section 4 (a) of the Act, which sets forth the pertinent statutory prohibitions, reads as follows:

It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered

> into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

The General Maximum Price Regulation issued under Section 2 of the Emergency Price Control Act on April 30, 1942 (7 F. R. 3153) provides in pertinent part as follows:

> § 1 *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:
>
> (a) No "person" shall "sell" or deliver any "commodity" * * * at a price higher than the maximum price permitted by this General Maximum Price Regulation * * *.
>
> § 2 *Maximum prices for commodities and services: general provisions.* Except as otherwise provided in this General Maximum Price Regulation, the "sellers" maximum price for any commodity or service shall be: "(a) The highest price charged by the seller during March, 1942.

STATEMENT

The petitioner operates numerous self-service grocery stores throughout the District of Columbia. This suit arose out of a sale of a can of Campbell's Soup to Miss Josephine McCorry by one of petitioner's stores located at 17th & Corcoran Sts., NW., Washington, D. C. (R. 4). The purchaser, on November 19, 1942, filed suit in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia to recover the sum of $50 from the petitioner pursuant to Section 205 (e) of the Emergency Price Control Act for an alleged overcharge in the sale of the can of soup (R. 2). Prior to trial, the respondent Administrator was granted leave to intervene as intervenor-applicant in support of the action (R. 1).[1]

The trial of the case was held on March 13, 1943. The plaintiff and a corroboratory witness proved that on November 14, 1942, petitioner sold plaintiff a can of soup for 14¢, the price marked on the top of the can (R. 2–4). The uncontradicted evidence further established that the maximum price for such commodity established by the General Maximum Price Regulation was 10¢ (R. 2).

[1] As provided by Rule 30 of the Municipal Court of Appeals for the District of Columbia, the record of the proceedings before the trial court consists solely of the application for appeal to the Municipal Court of Appeals (R. 1) and the objections thereto (R. 3), as certified by the court (R. 1).

The petitioner introduced evidence to the effect that about a month prior to the sale in question the Campbell's Soup Company had begun distribution of a new can of soup on which the retail ceiling price was 14¢ (R. 4); that the "new" and "old" style soups were kept on the same shelf; and that any improper marking on the can in question was due to a mistake (R. 4). The record contains no evidence of an intent to violate the price ceiling on the part of the petitioner.[2]

The Small Claims Court found that there had been a sale at 14¢, that the maximum price was 10¢ and that such a sale constituted a violation of the Act (R. 2). The court stated that the duty rested on the store manager to see that the merchandise was correctly marked (R. 5). Nevertheless the court held that it had discretion under the statute to determine the amount of the damages in the light of the evidence before it. Over the objection of the plaintiff and the Administrator, the court awarded plaintiff $5 rather than the $50 recovery for which plaintiff had prayed pursuant to Section 205 (e) of the Act (R. 2, 4).

The Administrator applied to the Municipal Court of Appeals for the District of Columbia for the allowance of an appeal, urging the importance of the question in the enforcement of the Act (R. 1). The application was granted on

[2] But see pp. 11–12, *infra*.

March 24, 1943 (R. 6). On June 8, 1943, the Municipal Court of Appeals affirmed the judgment of the lower court, one judge dissenting (R. 7–14).

The Administrator applied to the United States Court of Appeals for the District of Columbia for the allowance of an appeal from this decision, which was granted on August 16, 1943 (R. A.). On December 13, 1943, the Court of Appeals unanimously reversed the decision of the Municipal Court of Appeals, holding that where a violation of the Act and the Regulation has been shown, the trial court is without discretion to vary the minimum statutory damages but must enter judgment for the statutory amount of $50 or treble the overcharge, whichever may be the greater (R. 17–21).[3] Petitioner's motion for a rehearing (R. 22) was denied (R. 31).

ARGUMENT

1. Petitioner did not at any stage of the proceedings take an appeal from the judgment against it in the amount of five dollars. The only question properly presented by the petition for certiorari is the question argued before the court below and decided by it: whether the trial court had

[3] By stipulation filed December 10, 1943, and approved by the United States Court of Appeals on December 14, 1943, Chester Bowles, Administrator of the Office of Price Administration was substituted for Prentiss M. Brown, as appellant (R. 15–16).

discretion to enter judgment for the plaintiff in an amount less than fifty dollars. The court below thus defined the issue (R. 18–19):[4]

> Neither appellee nor the Municipal Court of Appeals suggests that inadvertence is a defense or that appellee has any defense. On the contrary, the court says and appellee does not deny that the judgment against appellee was proper.
>
> The only question in dispute is whether the judgment should have been for $5 or $50. The position of appellee and of the Municipal Court of Appeals appears to be that the Act confers upon the trial court discretion to award the statutory sum of $50 or not to award it, as the court may think reasonable in the light of equitable considerations of fairness and policy. We think that position untenable.

The opinion observes that the language of Section 205 (e) unequivocally provides for a minimum recovery of $50 or treble the overcharge, "whichever is the greater" (R. 18, 19). The opinion also points out that Section 205 (e), as

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[4] The standing of the Administrator, who intervened in the Municipal Court, to take an appeal has not been challenged, though the point was noticed by the Municipal Court of Appeals (R. 8, n. 4) and by the court below (R. 18). The action of these courts in upholding the right to appeal would seem to establish that right as a matter of local statutory procedure. There remains, of course, a possible question whether a controversy exists within the meaning of Article III of the Constitution. It is believed, however, that such a question need not be considered in this case, in view of the

contrasted with the penal provision of Section 205 (b) which expressly applies only against persons who "willfully" violate, contains no comparable language that may be taken as an indication of a Congressional intent to restrict the consumer's remedy exclusively to cases of intentional violation (R. 18). The opinion fully reviews the pertinent legislative history (R. 19), which is unusually specific and compelling. Finally, the Court of Appeals has forcefully stated the paramount considerations of wartime policy which dictated the enactment of Section 205 (e) in its present form—the need to supplement the necessarily limited enforcement facilities of the Government with aid from consumers and tenants; and, in order to ensure and encourage such consumer participation in enforcement, the need to frame the statute in such a way as to hold out to the consumer the incentive of substantial recovery and simplified courtroom procedure (R. 19, 20). No professional enforcement staff of rea-

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legislative character of the Municipal Court and the Municipal Court of Appeals, and the dual character of the Court of Appeals for the District of Columbia (see *O'Donoghue* v. *United States*, 289 U. S. 516, 550–551). The constitutional question would relate only to the power of this Court to review the decision on certiorari. Cf. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. If the present case is not otherwise worthy of review, it is believed that the question of this Court's power of review would not in itself warrant the granting of certiorari to determine whether a controversy in the constitutional sense exists.

sonable size could hope to police the millions of daily retail and rental transactions which are subject to control under the present Act. The indispensable participation of consumers and tenants in enforcement would be discouraged if these persons faced difficult tasks of proof as to scienter in statutory damage actions, and if they had to contend with the gamble of an indeterminate recovery.

The Court of Appeals, in its analysis of the statutory language, might have added that the closing sentence of Section 205 (e) ("The provisions of this subsection shall not take effect until the expiration of six months from the date of enactment of this Act.") is a plain and compelling indication that Congress appreciated that this enforcement remedy was necessarily rigorous and consequently provided that sellers should have a reasonable initial period in which to accustom themselves to the new program of controls before being subjected to the absolute statutory liability established by Section 205 (e). Doubtless the Court of Appeals felt it unnecessary to elaborate further upon the related issues of absolute liability and unintentional violation in view of petitioner's willingness below to concede these issues, insofar as they bear on the fundamental question whether an action under Section 205 (e) lies against an unintentional violator (R. 18). Statutory remedies establishing liability without fault

in the public interest have often been upheld by this Court. E. g., *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57; *United States* v. *Balint,* 258 U. S. 250; *Overnight Transportation Co.* v. *Missel,* 316 U. S. 572. While the present provision, as held below, is remedial (R. 20), it is to be observed that statutes of this type providing for multiple recoveries have been approved irrespective of their characterization as penal (*Minneapolis & St. Louis Ry. Co.* v. *Beckwith,* 129 U. S. 26), or remedial (*Overnight Transportation Co.* v. *Missel,* supra).

2. Petitioner seeks to raise the question whether Section 205 (e) is in any event applicable to an "innocent overcharge" (Pet. 6–14). While that question is an important one in the administration of the Act, it is submitted that the present case does not afford a proper occasion for its decision. As already noted, no appeal was taken by petitioner to the Municipal Court of Appeals or to the Court of Appeals for the District of Columbia. Thus no attack was made by petitioner on the judgment granting damages in the amount of $5. While it is true, as petitioner argues (Pet. 6, n. 3), that an appellee may support a judgment on grounds rejected by the lower court, that principle is not applicable here. Aside from the fact that the contention here made was not raised below, the record is not adequate for its consideration. The record consists only of the

appellant's application for appeal and the appellee's objections thereto, as certified by the Municipal Court (see note 1, *supra*). Since petitioner took no appeal, there was no occasion for the Administrator to include in the statement on appeal facts which would bear on the character of the petitioner's admitted violation of the regulation; the issue was limited to the power of the trial court to award damages in an amount less than the statutory minimum. In fact, there was evidence at the trial, not included in the statement on appeal, showing that about one week prior to the transaction giving rise to this suit, the plaintiff purchased the identical article in the same store and pointed out to the manager that the can was marked 14 cents instead of 10 cents, whereupon she was charged 10 cents. The evidence also showed that on this occasion plaintiff warned an employee that the cans of new and old style soup were commingled on the shelf, and advised that these cans should be segregated to avoid confusion and to aid in proper observance of price ceilings. This incident is particularly significant in view of petitioner's strong insistence at this time (Pet. 9–11, 22–24) that Section 205 (e) should be construed as inapplicable to cases where the purchaser has not called the overcharge to the attention of the seller and thus given the seller an opportunity to correct any "error". We do not suggest that petitioner's contention is sound as a

matter of law. We maintain only that petitioner is not entitled to secure a ruling on it in view of the state of the record.

3. The decision of the Court of Appeals is not in conflict with the decision of any appellate court. The decisions of all district courts [5] and of all but a very small number of state courts [6] which have passed upon the issue are in accord. The issue in this case, since it does not involve any statutory restriction upon the equity powers of the courts, but instead turns on the scope of a statutory cause of action at law, is distinct from the issues recently determined by the Court in *The Hecht Co.* v. *Bowles,* No. 316, present Term.

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[5] *Brown* v. *Cummins Distilleries Corp.*, 53 F. Supp. 650 (W. D. Ky. 1944); *Brown* v. *Griffin Grocery Co.* (E. D. Okla. 1944), OPA Service 620:419; *Bowles* v. *Vinson* (D. N. Mex. 1943), OPA Service 620:312; *Bowles* v. *National Erie Corp.* (W. D. Pa. 1944), not yet reported; *Bowles* v. *Augustine* (N. D. Cal. 1944), not yet reported; *Bowles* v. *Rainbow Cleaners & Dyers* (D. D. C. 1944), not yet reported. But see *Brown* v. *Ciffo* (S. D. N. Y.), not yet reported.

[6] *Zwang* v. *A. & P. Food Stores* (N. Y. S. Ct., App. Term, 1st Dept. 1944), OPA Service 620:438; *Barden* v. *Mills* (Mun. Ct., Macon, Ga., 1943), OPA Service 622:287; *Maitland* v. *Krieger* (Ct. Com. Pleas, Essex Cy., N. J., 1944), OPA Service 622:340; *Lewandowski* v. *Mirecki* (Civ. Ct., Milwaukee, Wisc., 1944), not yet reported; *Hogge* v. *Davis* (Ct. of Law and Equity, Richmond, Va., 1944), not yet reported; and *Stotts* v. *Ohler* (Cy. Ct. Denver, Colo., 1944), not yet reported. *Contra: Terry* v. *Eppley Hotels* (Mun. Ct. Lincoln, Neb., 1943) not yet reported; *Gelmini* v. *Ducki* (Ct. Comm. Pl., Conn., 1943), not yet reported.

CONCLUSION

The decision of the Court of Appeals is correct and there is no conflict with decisions of other appellate courts. In view of the state of the record, we feel impelled to oppose the petition.

Respectfully submitted,

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APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 812.

AMERICAN STORES, INC., *Petitioner,*

v.

CHESTER BOWLES, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR PETITIONER.

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1. The respondent has gone *dehors* the record in an attempt to show that about a week prior to the purchase, which is the subject matter of this suit, the plaintiff had purchased the identical article in the same store and pointed out to the manager that the can was marked 14¢ instead of 10¢ (Respondent's Brief, p. 12). While there was some testimony by the plaintiff that she had made such a pur-

chase, she did not testify that she had pointed out any error to the manager. On the contrary, she admitted that she did not recognize or know the manager.

2. Again, *dehors* the record, the respondent states that the evidence at the trial showed that on the occasion of the first purchase, "plaintiff warned an employee that the cans of New and Old Style Soup were co-mingled on the shelf and advised that these cans should be segregated to avoid confusion and to aid in proper observance of price ceilings" (Respondent's Brief, p. 12). This is a considerable elaboration of what plaintiff actually said. Her evidence on this point was simply that about a week before the sale in question, she made some sort of statement to an unidentified clerk at a cash register that the particular type of soup was incorrectly marked.

3. The respondent, prior to submitting his brief, requested petitioner to enter into a stipulation of his version of the above matters as set forth in his brief. The petitioner refused because (1) it disputes the truth of the plaintiff's testimony on the matters involved, (2) the Trial Court did not find for the plaintiff on the issues presented by this testimony, and (3) as pointed out, the respondent's version is materially erroneous. Nevertheless, the respondent inserted his version of these matters, not of record, into his brief.

4. The respondent's purpose in stating this alleged evidence was to meet the petitioner's contention that Section 205(e) is inapplicable where the purchaser has failed to call an overcharge, not otherwise shown to be wilful, to the attention of the seller in order to give him an opportunity to correct any mistake (Respondent's Brief, pp. 11-13). The record in this case does not show that the petitioner's attention was ever called to an overcharge by the plaintiff. While, as before noted, the plaintiff did testify vaguely of having made some complaint the week before, her testimony was unreliable and was disregarded by the Trial Court and

by the respondent, and is not a matter of record. The respondent says that the petitioner is not entitled to secure a ruling on its contention "in view of the state of the record", but this is hardly true unless the record includes the respondent's brief.

The record is complete and entirely adequate. It clearly shows that all the testimony was considered. The Municipal Court of Appeals found that the improper marking of the cans "resulted from an inadvertence of an employee. There was no evidence of an intent to violate the price ceiling regulations. It does not appear whether the plaintiff, having selected the can from a shelf properly marked, realized at the time that an overcharge was made by the cashier, or called attention to the error" (Opinion, Municipal Court of Appeals, R. 9). Implicit in these findings is the determination that there was no credible evidence of any overcharge having at any time been called to the attention of the petitioner by the plaintiff.

5. Upon the version of the plaintiff's testimony set forth in the respondent's brief, it appears that she deliberately permitted herself to be overcharged, knowing that the petitioner had made an innocent error (Respondent's Brief, p. 12).

6. The respondent asserts as its reason for failing to include in the statement on appeal the disputed testimony of the plaintiff, which is not of record, that he did not believe that evidence bearing on the character of the "petitioner's admitted violation of the regulation" would be relevant to the issues on appeal (Respondent's Brief, p. 12).

In the first place, the petitioner has never "admitted" any violation of the regulation. An innocent overcharge was found as a fact by the Trial Court upon conflicting testimony.

In the second place, it was plain, or should have been plain, to all concerned at that time that the character of the alleged overcharge, that is, whether it was intentional or

not, or whether it was induced by the plaintiff, was an important issue in the case.

This clearly appears from the record and from the decision of the Municipal Court of Appeals (R. 3-5, 7). We respectfully suggest that the respondent is making a lame excuse for his failure to include in the record what he now thinks would be favorable to him.

7. The respondent refers to the petitioner's willingness to concede below the applicability of the Statute to unintentional violations (Respondent's Brief, p. 10), but as shown in the petition, at p. 6 (Note 3), no such concession was ever made.

8. The respondent is, in effect, attempting to re-open an issue of fact, upon which the decision of the Municipal Court of Appeals is predicated and which, until the filing of respondent's brief, has never been disputed. If this can be done, the petitioner would have the right to re-open in this Court the factual issue of whether the alleged overcharge had ever been made.

9. Finally in desperation, respondent has attempted to raise some doubt as to the constitutional power of this Court to review the decision of the Circuit Court of Appeals on *certiorari* (Respondent's Brief, pp. 8-9, Note 4). The plain answer to that suggestion is that it is well settled that "jurisdiction in the case of an intervention is determined by that of the main cause". See *St. Louis K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 250. Moreover, the petitioner is certainly in the same position, with respect to the judgment, as if there had been no intervention.

Respectfully submitted,

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